Florida Constitutional Challenge to Obamacare: It All Comes Down to Broccoli

*By Karen R. Harned**

Note from the Editor:

This paper provides an update on the litigation dealing with the Patient Protection and Affordable Care Act signed into law in 2010, and examines some of the arguments made in the case, which is now headed to the U.S. Supreme Court. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about the health care litigation. To this end, we offer links below to briefs and court opinions on various sides of this issue and invite responses from our audience. To join the debate, you can e-mail us at info@fed-soc.org.

Related Links:

- Florida *ex rel.* Attorney General v. U.S. Department of Health & Human Services, Nos. 11-11021 & 11-11067 (11th Cir. Aug. 12, 2011): http://www.ca11.uscourts.gov/opinions/ops/201111021.pdf
- Virginia *ex rel.* Cuccinelli v. Sebelius, Nos. 11-1057 & 11-1058 (4th Cir. Sep. 8, 2011): http://pacer.ca4.uscourts.gov/opinion.pdf/111057.P.pdf
- Seven-Sky v. Holder, No. 1:10-cv-00950 (D.C. Cir. Nov. 8, 2011): http://www.cadc.uscourts.gov/internet/opinions.nsf/055C0349A6E85D7A8525794200579735/$file/11-5047-1340594.pdf
- Thomas More Law Center v. Obama, No. 10-2388 (6th Cir. June 29, 2011): http://www.ca6.uscourts.gov/opinions.pdf/11a0168p-06.pdf
- Petition for Certiorari, U.S. Department of Health & Human Services v. Florida, No. 11-398 (U.S. Sept. 2011): http://www.justice.gov/osg/briefs/2011/2pet/7pet/2011-0398.pet.aa.pdf
- Brief of State Respondents, U.S. Department of Health & Human Services v. Florida, No. 11-398 (U.S. Oct. 17, 2011): http://www.supremecourt.gov/docket/PDFs/11-398%20BIO%20States.pdf
- Reply Brief for Petitioners, U.S. Department of Health & Human Services v. Florida, No. 11-398 (U.S. Oct. 2011): http://www.justice.gov/osg/briefs/2011/2pet/7pet/2011-0398.pet.rep.pdf

On August 12, 2011, the Eleventh Circuit Court of Appeals ruled that Congress exceeded its authority by forcing all Americans to purchase health insurance through the health care law's "individual mandate." A 2-1 majority held that enacting the individual mandate was beyond Congress's power under the Commerce Clause. However, the court held that while the individual mandate was unconstitutional, it was severable from the law as a whole, and the rest of the law could stand.

Just a year earlier, then-U.S. House of Representatives Speaker Nancy Pelosi dismissed the idea that there was even a question regarding the constitutionality of this law, which dramatically changes 17.6% of the nation's economy.[1] As of the writing of this article, thirty-one challenges to the health care law have been filed in federal courts across the country, with mixed results. The Eleventh Circuit was the first appellate court to find the law unconstitutional—both the Sixth Circuit and District of Columbia Circuit previously upheld the law. On November 14, 2011, the U.S. Supreme Court announced it would hear the case in its 2011-2012 Term. As a result, a final decision on the law's constitutionality is expected in June 2012, just as the presidential election is in full swing.

The Individual Mandate and the Commerce Clause

"The powers delegated by the . . . Constitution to the federal government are few and defined," whereas "[t]hose which . . . remain in the State governments are numerous and indefinite."[2] These principles must apply to the interpretation of the Commerce Clause, which bestows upon Congress the power to regulate commerce with foreign nations, among the several states, and with the Indian tribes.[3] For example, the Commerce Clause was intended to be a "negative and preventative provision against injustice among the states themselves, rather than as a power to be used for the positive purposes of the General Government."[4] Here, the ACA's mandate invades the states' traditional protection of their citizens' health and welfare by compelling individuals to enter into contracts to subsidize the insurance industry and its voluntary customers.[5] This exercise of plenary police power is not authorized by the Constitution.

The notion that the Commerce Clause permits Congress only to regulate interstate activities was quashed in modern-day Commerce Clause jurisprudence. In *Wickard v. Filburn*, the Supreme Court held that even where a farmer, Filburn, was growing wheat on his own farm for personal consumption with no intent to sell it, Filburn's wheat-growing activities reduced the amount of wheat he would buy. Wheat was traded nationally, and, as a result, Filburn's production of excess wheat affected interstate commerce. Therefore, it could be regulated

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by the federal government under the government's Commerce Clause powers.[6]

Similarly, in *Gonzales v. Raich*, the Supreme Court held that the Commerce Clause permitted the government to criminalize the production and use of homegrown cannabis, even when permitted for medicinal use.[7] No longer was interstate activity required for Congress to have regulatory power. Instead, Congress was empowered to regulate business activity that was purely local, if the aggregate activity had a substantial effect on interstate commerce. As a result, there are essentially no limits to Congress's ability to regulate as long as the commerce being regulated constitutes an "activity."

In *United States v. Lopez*, the Supreme Court set limits to Congress's Commerce Clause power, holding that Congress did not have the power to regulate the carrying of handguns in school zones without providing a sufficient link to interstate commerce.[8] The *Lopez* Court set out three categories of activity that Congress was empowered to regulate: "the *channels* of interstate commerce, the *instrumentalities* of interstate commerce, or *persons or things* in interstate commerce, and activities that *substantially affect* or *substantially relate to* interstate commerce."[9] Relying on the *Lopez* decision, the Supreme Court held in *United States v. Morrison* that Congress did not have the authority to enact the Violence Against Women Act (VAWA) because the acts of violence that the VAWA dealt with did not have a substantial enough effect on interstate commerce.[10]

In summary, Commerce Clause jurisprudence to date has focused exclusively on activities. The main debate in Commerce Clause cases to date is over whether or not an activity "substantially affects" interstate commerce and not whether the subject of regulation constitutes activity in the first place. Thus, the decisions to grow wheat and produce cannabis are activities that substantially affect interstate commerce and can therefore be regulated. Conversely, the decisions to carry a handgun or commit violence, while activities, do not substantially affect interstate commerce and cannot be regulated. In none of these cases was inactivity or the decision not to engage in activity discussed. The Government's contention that a non-activity such as the decision not to buy health insurance can be regulated by Congress is a novel idea in Commerce Clause jurisprudence. Thus, even under the Supreme Court's broadest conception of the Commerce Clause, typified by *Raich* and *Gonzalez*, the individual mandate cannot be justified.

The Commerce Clause Does not Provide Constitutional Justification for the Mandate

Congress' power to regulate under the Commerce Clause broadly allows Congress to regulate interstate commerce as well as address other conduct that "substantially affect[s] interstate commerce."[11] All that needs be considered is the aggregate effect of particular conduct on interstate commerce—Congress need not consider whether and to what extent individual actors contribute to that conduct.[12] Moreover, the courts have a "modest" role in reviewing Commerce Clause litigation. All that is required is a finding that Congress had a "rational basis" for concluding conduct has a substantial impact on interstate commerce. The courts similarly should give broad deference to Congress regarding the means chosen to achieve a legitimate end.

The individual mandate is not justified by the Commerce Clause because forcing individuals to buy health insurance is not a regulation of commerce. Under controlling precedent, Congress may regulate under its commerce power: (1) "the use of the channels of interstate commerce"; (2) the operation of "the instrumentalities of interstate commerce"; and (3) "those activities that substantially affect interstate commerce."[13] Yet none of these "categories of activity" encompasses the inactivity regulated by the mandate—i.e., the failure to purchase health insurance.

The Mandate Does Not Regulate Commerce

The Government justified Congress's passage of the ACA by arguing that Congress intended to regulate the health insurance and health care markets to ameliorate the cost-shifting problem brought about by individuals who do not have insurance but at some time seek medical care for which they cannot pay.[14] Furthermore, the Government defended the individual mandate as constitutional because it regulates "quintessentially economic" activity related to an industry of near universal participation and does not compare to the regulations in *Lopez* and *Morrison*, which only touched on criminal conduct, not economic activity. Congress only mandated how Americans finance their inevitable healthcare needs.[15] Embedded in the Commerce Clause, the Government contended, is the power to override ordinary economic decisions and redirect funds Americans would spend anyway to other purposes.[16] Thus, the Commerce Clause gives Congress the power to direct and compel an individual's spending in order to further its regulatory goals.[17]

The plaintiffs argued that the mandate does not regulate commerce itself, in either its interstate or intrastate channels or instrumentalities. Rather the mandate compels the uninsured to participate in the health insurance market. The Commerce Clause gives Congress the power to regulate interstate commerce, but not the power to force individuals to enter into commerce. For example, while Congress may regulate the terms of voluntary contracts between General Motors and its customers, it may not compel individuals to enter into purchase contracts with GM because there is no pre-existing "commerce" to regulate. Otherwise, Congress could force individuals to purchase any product, from GM cars to Citibank mortgages to broccoli. Compelling commerce, here the ACA's punishment of individuals for not buying insurance, is not *regulating* commerce.[18] Since the "regulated" individuals have not entered the insurance market, there is no "commerce" for the ACA to regulate.[19]

The Individual Mandate Regulates the Non-Purchase of Health Insurance, Not the Non-Payment for Healthcare

One defense of the individual mandate proposed by Congress was that it ameliorated the cost-shifting problem caused when people sought medical care they could not pay for. This is the so-called "free rider" problem. The mandate, the Government argued, only directs how Americans would finance their inevitable health care needs. The plaintiffs countered that the mandate does not regulate how individuals pay for health care, but instead only their failure to obtain health insurance.[20] The mandate penalizes them for not having health insurance in a given month, even if they obtained no medical care that month.[21] Conversely, it does not penalize those who do have insurance but have failed to pay their medical bills.[22]

The Eleventh Circuit's ruling sided with the plaintiffs. The majority found that the language of the individual mandate does not really regulate "how and when health care is paid for," but instead regulates those who have not entered the health care market at all.[23] Indeed, the majority found that the mandate "does not even require those who consume healthcare to pay for it with insurance."[24] Thus, the mandate actually regulates the non-purchase of health insurance, a totally different subject matter than that proposed by the Government.[25]

The majority also observed that the primary targets of the individual mandate were not the so-called "free riders," who obtain medical care without paying for it, but are actually individuals who are relatively healthy and wealthy but were compelled to enter into contracts to subsidize insurance companies.[26] The plaintiffs argued that the mandate was not crafted to regulate how people pay for their health care, but was instead a tactic to subsidize the insurance industry by forcing healthy individuals to enter into insurance contracts.[27] The majority agreed: the mandate forces non-free riders to "pay insurance premiums now to subsidize the private insurers' cost in covering more unhealthy individuals under the Act's reforms."[28]

The Mandate and Regulation of a Class of Economic Activities that Substantially Affects Interstate Commerce

Substantial Effects Doctrine

Modern Commerce Clause jurisprudence holds that only an economic activity that substantially affects interstate commerce may be regulated by Congress. The Government claimed that the mandate meets this test because the status of being uninsured "substantially affects" interstate commerce and thus falls within Congress's commerce power.[29] However, the plaintiffs argued that the Government's line of reasoning is at odds with the Supreme Court's "substantial effects" precedent and would eviscerate the entire concept of enumerated powers.

Congress's enumerated power to regulate "interstate commerce" does not necessarily confer power to regulate "things affecting interstate commerce."[30] The "substantial effects" doctrine allows Congress to regulate intrastate activities affecting interstate commerce only to effectuate the execution of its enumerated power to regulate interstate commerce.[31] A common issue under which courts have allowed Congress to exercise its Commerce Clause powers occurs when the aggregate effect or a product's local use adversely "influences the prices and market conditions" desired by Congress.[32] Since local and national products are fungible, the substantial effects doctrine eliminates the distinction between intrastate and interstate commerce.[33]

Supreme Court precedent demonstrates this point. In a line of cases illustrated by *Wickard* and *Raich*, the Court allowed for a broader interpretation of the "substantial effects" doctrine. For example, in *Wickard*, while aiming to increase wheat prices nationally, Congress restricted the amount of wheat that farmers could grow, even if for personal use.[34] The Court upheld the restriction because local wheat production would obstruct Congress's goal of raising interstate prices[35] because local wheat production both increased the supply of wheat that could be sold interstate and decreased demand for purchasing wheat intrastate.[36] Similarly, in *Raich*, Congress's attempt to eliminate the interstate market for marijuana was undercut by intrastate manufacture and possession of state-law-authorized medical marijuana.[37] While numerous regulations have been upheld under the "substantial effects" doctrine, it is critical that none have involved regulation of individuals who neither participate in commerce nor pose barriers to commerce.[38]

Contrarily, in *Lopez* and *Morrison*, the Court demonstrated that the doctrine has limits when it clarified that some barriers to commerce may *not* be regulated under the "substantial effects" doctrine. For instance, *Lopez* invalidated a law banning gun possession near schools, and *Morrison* invalidated a law providing civil remedies for violence against women.[39] Even though these activities certainly had substantial negative effects on the United States' commercial productivity, the regulated individuals had not engaged in any "economic activity" resembling the type of "commerce" that Congress could regulate at the interstate level.[40]

Accordingly, the plaintiffs argued that there are three reasons why the "substantial effects" doctrine does not confer upon Congress the power to compel individuals to purchase health insurance. First, the "substantial effect" of not participating in commerce is not a barrier to commerce.[41] Second, not participating in the insurance market is *not* "economic activity."[42] Finally, expanding the doctrine to include *not* purchasing a product would create plenary federal power.[43]

A majority of the Eleventh Circuit panel agreed with the plaintiffs when it found that regardless of the uninsured's effects on interstate commerce, the uninsured lacked a sufficient connection, or nexus, to interstate commerce.[44] The majority stressed that what matters is the regulated subject matter's connection to interstate commerce; that connection is lacking in the case of the individual mandate.[45] "Under any framing, the regulated conduct is defined by the *absence* of both commerce or even 'the production, distribution, and consumption of commodities'—the broad definition of economics in *Raich*."[46]

Non-Participation in the Health Insurance Market Is not Economic Activity

The plaintiffs argued that inactivity in the health insurance market is non-economic activity and thus not reachable by the government through the Commerce Clause. The non-purchase of health insurance is not "economic activity" according to the Supreme Court because it is not "the production, distribution, [or] consumption of commodities."[47] In fact, the non-purchase of insurance is even less connected with commerce than gun possession in *Lopez* since guns can only be possessed after being produced, distributed and acquired through commercial transactions.[48] Since Lopez's possession of a gun in a school zone was not economic activity, the same conclusion must follow for the uninsured's inactivity, which "continues their estrangement from the insurance market and thus leaves them even more remote from commerce than was Lopez."[49]

Surprisingly, the Eleventh Circuit quickly dispensed with the activity/inactivity debate in this case. Even though it recognized that the Supreme Court's Commerce Clause jurisprudence uniformly involved Congress attempting to regulate pre-existing activities, it found this formalistic dichotomy insufficient to decide this case.[50] The majority observed that to the extent that uninsured Americans can be described as "active" in the insurance market, their activity is the absence of their participation in the market.[51] Thus, the majority concluded, the individual mandate could not be clearly classified as regulating either economic activity or noneconomic activity.[52]

Non-Participation in the Insurance Market Does not Burden or Obstruct Commerce

Additionally, the plaintiffs argued that non-participation in the health insurance market is not an activity that obstructs or burdens commerce. Persons whose intrastate activities adversely affect Congress' preferred market conditions can affect interstate commerce by "imposing burdens and obstructions" or by creating "potential stimulants."[53] However, individuals without health insurance are not involved in the health insurance market at all and thus do not stimulate or obstruct its operation.[54] Because market non-participants, like the uninsured, impose no barriers to interstate commerce, regulating them is not justified as a prophylactic execution of Congress' commerce power.[55] Analogously, Congress could not force urban pedestrians to purchase car insurance on the theory that their refusal to do so burdens the car insurance market because they were selecting out of the "risk pool."[56] In fact, the Government conceded that individuals do not engage in commerce when declining to purchase insurance; they also do not affect commerce when making that same decision.[57] The majority observed that because of the realities of the modern marketplace, the decision not to buy insurance, when aggregated, would substantially affect the insurance market.[58] However, the majority found that it would need to apply the aggregation principle to citizens *outside* the stream of commerce.[59] This application, it said, had the danger of making Congress's power to regulate unlimited.[60]

The "Substantial Effects" Doctrine Cannot Be Expanded to Cover Non-Participation in the Health Insurance Market without Federal Power Becoming Plenary.

Finally, the plaintiffs contended that if the "substantial effects" doctrine is used to uphold the individual mandate, the government would be granted plenary regulatory power and the concept of limited federal government would be eviscerated. Since all inactivity could be deemed to substantially affect interstate commerce, Congress could require *any* purchasing decision. If not purchasing health insurance is reachable under the Commerce Clause, one would be "hard pressed to posit any [in]activity by an individual that Congress [would be] without the power to regulate."[61] In fact, the Congressional Budget Office already recognized that the individual mandate could lead to a "command economy, in which the President and Congress dictated how much each individual and family spent on all goods and services."[62] This, noted the majority, underscored the necessity of a strong nexus between the regulated activity and interstate commerce. Otherwise, the government could require the purchase of any product, given that the aggregated effect of the non-purchase of any good will always have a substantial effect on commerce.[63]

The Government appreciated the far-reaching consequences of the ACA, but argued that the individual mandate did not involve the creation of a plenary power for Congress. In its explanation, the Government essentially argued that the mandate is an emergency tool for use in an extreme and unique situation. The Government argued that health care and the health insurance industry are unique. Therefore, the mandate is not likely to lead to a plenary power because of the inevitability of the need for health care, the unpredictabilitiy of that need, the high costs associated with health care, the federal requirement that hospitals treat uninsured individuals, and the resulting cost-shifting.[64]

The majority rejected this line of reasoning, however, because from a doctrinal standpoint, there is no way to limit the Government's theory to decisions not to purchase health insurance.[65] The five factual criteria posited by the Government to make the health care market appear "unique" are not "limiting principles rooted in any constitutional understanding of the commerce power."[66] Thus, if the Government's position was adopted, Congress could have plenary power over all economic decisions because there is no way to cabin the Government's rationale whether or not the health care market is unique.[67]

The Mandate and the Necessary and Proper Clause

Congress may "make all Laws which shall be necessary and proper for carrying into Execution [its enumerated] Powers . . . ."[68] The Necessary and Proper Clause confirms that Congress has "incidental power" to further the legitimate end of executing its enumerated powers through appropriate means that are plainly adapted and consistent with the spirit of the Constitution.[69] The plaintiffs maintained that the mandate is neither necessary nor proper and thus that the Government's reliance on the clause is nothing more than a last-ditch effort to "defend ultra vires congressional action."[70]

The Mandate Is Not a Necessary Means of Carrying the ACA's Commercial Regulations into Execution

The Government relies heavily on the breadth of the Necessary and Proper Clause to ultimately save the individual mandate. The individual mandate is not necessary to serve the end of carrying the ACA into execution. The Government contended that "Congress's power extends to the regulation of even 'noneconomic local activity' otherwise beyond the reach of the commerce power" where "needed to make [a] regulation [of interstate commerce] effective" because "failure to regulate [the uninsured] would undercut the regulation of the [insurance] market."[71] Under this "effective regulation" doctrine, Congress may regulate economic and noneconomic activity, but only if doing so is a "necessary part of a more general regulation of interstate commerce" because the activity interferes with, obstructs, or undercuts the regulatory scheme.[72] Here, the uninsured's activity does not affect congressional regulation of the interstate health insurance market because the uninsured neither impede nor frustrate regulation of market participants.[73]

The Government responded that Congress found that eliminating the uninsured was essential to cure the problem that insurers would lose money due to individuals who postpone purchasing insurance until the need for it arose.[74] However, the plaintiffs argued, and the 11th Circuit agreed, that the uninsured are not interfering with Congress's efforts to regulate insurers.[75] The majority noted that the individual mandate is not designed to enable the execution of the ACA's regulations, but is actually designed to "counteract the significant regulatory costs on insurance companies and adverse consequences stemming from the fully executed reforms."[76]

The Necessary and Proper Clause does not authorize Congress to pursue ends outside of its legitimate, enumerated powers. Yet, it is an illegitimate end to offset a regulatory scheme's costs for market participants by compelling third parties who are not part of the scheme to participate.[77] This is especially true where, as here, those third parties are not barriers to the effective execution of the regulatory scheme.[78] There is no regulation being affected, or commerce being regulated, by forcing uninsured individuals to participate in the health insurance market in order to subsidize participants in the market.[79] Congress's powers cannot be enhanced solely because it created costs that need to be offset.[80]

The Necessary and Proper Clause does not permit Congress to reduce a regulatory scheme's cost for market participants by regulating strangers to the scheme.[81] For example, in *United States v. DeWitt*, the Government defended a federal ban on the intrastate sale of certain illuminating oils.[82] The ban was defended on the basis that it aided and supported the federal tax imposed on other illuminating oils because eliminating competition from the banned oils would increase production of the taxed oils and therefore increase tax revenue.[83] Similar to the individual mandate, the regulation of some individuals was justified because it would support others that were burdened by the government's regulation and would make the scheme more effective.[84] The Court found that the ban was not permissible because it was not an appropriate and plainly-adopted means for carrying out Congress's power to lay and collect taxes.[85]

The plaintiffs contended that any contrary conclusion would convert the Necessary and Proper Clause into a "vehicle for Congress to pursue 'ends' beyond its enumerated powers."[86] The plaintiffs further contended that the mandate is not a means to accomplishing the end of regulating commerce in insurance but is instead imposed to counteract the costs imposed by the ACA.[87] This means that the mandate's justification actually arises from the ACA itself.[88] However, Congress's powers are derived from the Constitution, not from the statutes it passes.[89] "While Congress may broadly regulate interstate commerce under the Necessary and Proper Clause, it cannot use such regulation *to bootstrap* additional regulatory powers otherwise beyond Congress' reach."[90]

The Mandate Is Not a Proper Means of Carrying the ACA's Commercial Regulations into Execution

The individual mandate is not a proper means of carrying the ACA into execution. Laws are only "proper" under the Necessary and Proper Clause if they employ means that are "plainly adapted to [the legitimate] end, which are not prohibited, but consist[ent] with the letter and spirit of the constitution."[91] Under *McCulloch v. Maryland*, a "proper" law is (1) an ordinary method of execution that respects (2) the states' sovereignty and (3) the People's liberty. The plaintiffs contend that the individual mandate fails each of these factors.

First, the individual mandate is not plainly adapted. A regulation is "plainly adapted" if it invokes the "ordinary means of execution."[92] The Necessary and Proper Clause merely confirms the existence of "incidental or implied powers" to execute Congress's stated authority; the powers most readily "deduced from the nature of the objects themselves" are the "ordinary means of execution."[93] The plaintiffs argued that the mandate is far from being "incidental," "implied," and certainly not "plainly adapted" since it "plows thoroughly new ground and represents a sharp break with the longstanding pattern of federal . . . legislation."[94] The mandate is entirely unprecedented. In fact, not even the Congress that passed the New Deal thought of supporting wheat prices by forcing Americans to purchase wheat.[95]

Second, the individual mandate does not properly account for state interests and in fact tramples upon the states. The plaintiffs contend that the mandate demonstrates an acute disrespect for state interests by "foreclosing the states from experimenting and exercising their own judgment in an area which states lay claim by right of history and expertise."[96] The mandate invades the areas of health insurances and citizens' health and safety, which are typically left to the control of states.[97] The mandate contravenes at least the twenty-six state plaintiffs and represents a considerable federal intrusion into states' traditional authority to regulate for the health of their citizens.[98]

Finally, the individual mandate is not a proper means of executing Congress's enumerated powers because it unduly infringes on the liberty of individuals. The plaintiffs argue that one of the most fundamental rights enjoyed by Americans is their "freedom from being forced to give their property to, or contract with, other private parties."[99] The Supreme Court has observed that Congress should not be able to force a contract on an individual without his consent because the consent of the parties to be bound is the essence of a contract.[100] The plaintiffs contend that these interests are "gravely threatened" by the ACA's individual mandate, which compels citizens "to contract on disadvantageous terms with wealthier insurers to reduce costs" that are not related to any injury sustained or caused by those individuals.[101] The mandate tramples on the rights of the affected individuals and thus is not appropriately in the reach of the Congress's power under the Necessary and Proper Clause.[102]

The Mandate as a Tax

In addition to its Commerce Clause justification for the ACA, the Government argued that the individual mandate could be sustained under Congress's broad taxing power. The Taxing and Spending Clause provides that "Congress shall have the Power to lay and collect Taxes, duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States."[103] This power is plenary and comprehensive, and the fact that the individual mandate has a regulatory purpose is irrelevant because "a tax 'does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed.'"[104] So long as a statute produces revenue, Congress may enact it under the taxing power.[105]

Though Congress's taxing power is indeed plenary, the majority rejected the Government's contention that the individual mandate was a tax. First, the plain language of the statute establishes that the individual mandate is a penalty, not a tax. The majority noted that the language of the ACA repeatedly states that a "penalty" will be imposed on individuals for failing to obtain health insurance.[106] The majority would not construe Congress's choice of language as a careless one-time invocation of "penalty" because the other relevant provisions also describe the mandate as imposing a penalty, not as a tax.[107] The unambiguous text of the individual mandate provides that it imposes a penalty that aims to encourage compliance with the ACA's insurance requirement "by imposing a monetary sanction on conduct that violates that requirement."[108]

Second, even if the text of the ACA were unclear, the legislative history demonstrates that Congress intended to impose a penalty for failure to obtain and maintain health insurance. The majority observed that before the ACA was passed, earlier bills in both houses of Congress proposed an individual mandate that was accompanied by a tax.[109] For example, Section 401 of the "America's Affordable Choice Act of 2009," introduced in the House of Representatives, provided that "there is hereby imposed a tax" on any person who did not maintain minimum health insurance.[110] Furthermore, "America's Healthy Future Act," introduced in the Senate, also used the term "tax."[111] Thus, the majority found it notable that the final version of the ACA discontinued the use of "tax" in favor of "penalty."

The Government responded that the individual mandate is still "a tax in both administration and effect."[112] It claimed that in the process of evaluating the constitutionality of a tax law, the court should only be concerned with the law's practical operation, not its definition or the precise form of descriptive words that may be applied to it.[113] Since the individual mandate will produce revenue and be enforced by the Internal Revenue Service and is collected through taxpayers' annual tax returns, the Government argued that it is a tax.

The majority remained unpersuaded. The Government's claim that the mandate is a tax simply because it has a revenue-raising function was not dispositive because it did little to address the distinction between a tax and a penalty. The majority noted that criminal fines, civil penalties, and taxes all share the same features: "they generate government revenues, impose fiscal burdens on individuals, and deter certain behavior."[114] Furthermore, the majority observed that the individual mandate operates as a monetary sanction for an individual who has failed to obtain insurance.[115] In the majority's view, "such an exaction appears in every important respect to be punishment for an unlawful act or omission," which is a penalty.[116] Finally, the fact that the individual mandate is housed in the Internal Revenue Code and is collected through taxpayers' annual returns is also not dispositive. The Code itself makes clear that Congress's choice of where to place a provision has no interpretive value[117] and not every provision in the Code is a tax.[118] Thus, after review, the majority found that the individual mandate was a regulatory penalty, not a tax, and must find justification in a different enumerated power.

Severability

The district court found that the individual mandate was not severable from the ACA as a whole. The plaintiffs contended that it is well-established that once a court strikes a statute's unconstitutional provisions, the provisions remaining must be invalidated where Congress "would not have enacted those provisions . . . independently of that which is invalid."[119] The plaintiffs argued that in this analysis, courts must inquire whether the severed statute would "function in a manner consistent with . . . the original legislative bargain."[120] The plaintiffs asserted that under these principles the mandate cannot be severed from the ACA as a whole because the mandate "so affects the dominant aim of the statute" that it is inconceivable that Congress would have enacted the ACA without it.[121]

The Government argued that the district court erred when it found the Act to be non-severable.[122] This argument was curious in light of the fact that the Government recognized that the mandate is "integral" to the ACA's regulation of insurance.[123] Nevertheless, the Government maintained that while the mandate is integral to the ACA's operation, certain other provisions are not.[124] The Government proffered various examples: employer-provided rooms for nursing mothers, nondiscrimination protection for providers refusing to furnish assisted suicide services, and Medicare reimbursements for bone-marrow density tests.[125] The plaintiffs countered that the Government "cannot seriously claim that Congress 'would have been satisfied' with this menagerie of tag-along provisions."[126]

The Eleventh Circuit reversed the decision of the district court and found that individual mandate could be severed from the rest of the ACA. The majority began its application with the Supreme Court presumption in favor of severability: courts must "strive to salvage" acts of Congress by severing any constitutionally infirm provisions "while leaving the remainder intact."[127] The Supreme Court's test for severability is as follows: "Unless it is *evident* that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is *fully operative as a law.*"[128]

In its analysis, the majority offered several reasons why the district court erred in finding the individual mandate not severable from the rest of the ACA. At the outset, the court stated that "a lion's share" of the ACA has nothing to do with private insurance, let alone the individual mandate.[129] The majority found that representative samples of such provisions included establishing reasonable break time for nursing mothers, an HHS study on urban Medicare-dependent hospitals, restoration of funding for abstinence education, and an excise tax on indoor tanning salons.[130]

Furthermore, the majority found that the district court placed "undue emphasis" on the ACA's lack of a severability clause. The majority noted that in light of the Supreme Court's precedent that "the ultimate determination of severability will rarely turn on the presence or absence of such a clause," Congress's silence in that regard must not raise a presumption against severability.[131] The majority also observed that both Senate and House legislative drafting materials state that as a result of the Supreme Court's presumption of severability, severability clauses are "unnecessary unless they specifically state that all or some portions of a statute should *not* be severed."[132] Thus, the majority found that in light of controlling precedent, and Congress's own drafting materials, the plaintiffs did not meet the heavy burden required to rebut the presumption of severability.

Endnotes

1 *See* Ctrs. for Medicare & Medicaid Servs., National Health Expenditure 2009 Highlights 1 (2011).

2 United States v. Lopez*,* 514 U.S. 549, 552 (1995).

3 *See* U.S. Const. art. I, § 8.

4 W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 n.9 (1994).

5 *See* Brief For Private Plaintiffs-Appellees National Federation of Independent Business, Kaj Ahlburg, and Mary Brown at 13, Florida *ex rel.* Attorney Gen. v. U.S. Dep't of Health & Human Servs., (11th Cir. Aug. 12, 2011) (No. 11–11021) [hereinafter "Plaintiff's Brief"].

6 Wickard v. Filburn, 317 U.S. 111 (1942).

7 Gonzales v. Raich, 545 U.S. 1 (2005).

8 United States v. Lopez, 514 U.S. 549 (1994).

9 *Id.* at 559-560.

10 United States v. Morrison, 529 U.S. 598 (2000).

11 *Raich*, 545 U.S. at 17.

12 *See id*. at 22; United States v. Maxwell, 446 F.3d 1210, 1215 (11th Cir. 2006).

13 United States v. Lopez, 514 U.S. 549, 558-59; *accord* Gonzales v. Raich, 545 U.S. 1, 16-17 (2005).

14 *See* 42 U.S.C. § 18901(a)(1)(A), (H).

15 *See* Florida *ex rel.* Attorney Gen. v. U.S. Dep't of Health & Human Servs., Nos. 11-11021 & 11-11067, slip op. at 106 (11th Cir. Aug. 12, 2011).

16 *See id.* at 113.

17 *See id.*

18 *See* Plaintiff's Brief, *supra* note 5, at 15.

19 *See id.*

20 *Id.* at 50.

21 *See id.*

22 *See id.*

23 Florida *ex rel.* Attorney Gen. v. U.S. Dep't of Health & Human Servs., Nos. 11-11021 & 11-11067, slip op. at 130 (11th Cir. Aug. 12, 2011).

24 *Id.*

25 *See id.*

26 *See id.* at 140-41.

27 Plaintiff's Brief, *supra* note 5, at 51.

28 Florida *ex rel.* Attorney Gen. v. U.S. Dep't of Health & Human Servs., Nos. 11-11021 & 11-11067, slip op. at 140-41 (11th Cir. Aug. 12, 2011).

29 Brief for Appellants at 16, 24, Florida *ex rel.* Attorney Gen. v. U.S. Dep't of Health & Human Servs., (11th Cir. Aug. 12, 2011) (No. 11–11021) [hereinafter "Government's Brief"].

30 *See* Plaintiff's Brief, *supra* note 5, at 16.

31 United States v. Darby, 312 U.S. 100, 118-120 & n.3 (1941).

32 *See* Plaintiff's Brief, *supra* note 5, at 17.

33 *See id.* at 18.

34 Wickard v. Filburn, 317 U.S. 111, 113-15, 127-29 (1942).

35 *Id.* at 127-29.

36 *See id.*

37 Gonzales v. Raich, 545 U.S. 1, 17-22, 25-32 (2005).

38 *See* Plaintiff's Brief, *supra* note 5, at 19.

39 United States v. Lopez, 514 U.S. 549, 551, 563-64 (1995); United States v. Morrison, 529 U.S. 598, 601-02, 614-15 (2000).

40 *See* Plaintiff's Brief, *supra* note 5, at 20 (citing *Lopez*, 514 U.S. at 611; *Morrison*, 529 U.S. at 561).

41 *Id.*

42 *Id.*

43 *Id.*

44 Florida *ex rel.* Attorney Gen. v. U.S. Dep't of Health & Human Servs., Nos. 11-11021 & 11-11067, slip op. at 125-26 (11th Cir. Aug. 12, 2011).

45 *Id.*

46 *Id*.

47 Gonzales v. Raich, 545 U.S. 1, 25-26 (2005).

48 *See* Plaintiff's Brief, *supra* note 5, at 25 (citing United States v. Lopez, 514 U.S. 549, 561 (1995)).

49 *Id.* at 25-26.

50 Florida *ex rel.* Attorney Gen. v. U.S. Dep't of Health & Human Servs., Nos. 11-11021 & 11-11067, slip op. at 109 (11th Cir. Aug. 12, 2011).

51 *Id.* at 111.

52 *Id.*

53 Gonzales v. Raich, 545 U.S. 1, 35 (2005).

54 *See* Plaintiff's Brief, *supra* note 5, at 21.

55 *See id.* at 21.

56 *See id.* at 23.

57 *Id*. at 24-25.

58 Florida *ex rel.* Attorney Gen. v. U.S. Dep't of Health & Human Servs., Nos. 11-11021 & 11-11067, slip op. at 124 (11th Cir. Aug. 12, 2011).

59 *Id.*

60 *Id*.

61 *See* United States v. Lopez, 514 U.S. 549, 564 (1995).

62 Cong. Budget Office, The Budgetary Treatment of an Individual Mandate to Buy Health Insurance (1994), *available at* http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf.

63 *See* Florida *ex rel.* Attorney Gen. v. U.S. Dep't of Health & Human Servs., Nos. 11-11021 & 11-11067, slip op. at 124-25 (11th Cir. Aug. 12, 2011).

64 *See id.* at 131-32.

65 *Id.* at 125, 131-32.

66 *Id.*

67 *See* Plaintiff's Brief, *supra* note 5, at 27.

68 U.S. Const. art. I, § 8, cl.18.

69 *See* McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

70 Plaintiff's Brief, *supra* note 5, at 30; Printz v. United States, 521 U.S. 898, 923 (1997).

71 Government's Brief, *supra* note 29, at 18, 28, 33.

72 Gonzales v. Raich, 545 U.S. 1, 36-37 (2005).

73 *See* Plaintiff's Brief, *supra* note 5, at 33-34.

74 Government's Brief, *supra* note 29, at 28-32.

75 Plaintiff's Brief, *supra* note 5, at 34; Florida *ex rel.* Attorney Gen. v. U.S. Dep't of Health & Human Servs., Nos. 11-11021 & 11-11067, slip op. at 164-65 (11th Cir. Aug. 12, 2011).

76 *Florida ex rel. Attorney Gen.*, Nos. 11-11021 & 11-11067 at 164-65.

77 *See* Plaintiff's Brief, *supra* note 5, at 34.

78 *See id.*

79 *See id.*

80 *See id.*

81 *See id.* at 35-36; United States v. DeWitt, 76 U.S. 41 (1869).

82 *DeWitt*, 76 U.S. at 41.

83 *Id.* at 44.

84 *See* Plaintiff's Brief, *supra* note 5, at 36.

85 *DeWitt*, 76 U.S. at 44.

86 Plaintiff's Brief, *supra* note 5, at 37.

87 *Id.*

88 *See id.*

89 *See id.*

90 *Id.*

91 McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

92 *Id*. at 409.

93 *Id* at 406-09, 420-21.

94 Plaintiff's Brief, *supra* note 5, at 43; *see* United States v. Lopez, 514 U.S. 549, 563 (1994).

95 *See* Wickard v. Filburn, 317 U.S. 111, 113-15, 127-29 (1942).

96 *See* United States v. Lopez, 514 U.S. 564, 583 (1995).

97 *See* Plaintiff's Brief, *supra* note 5, at 45.

98 *See id.* at 46 (citing City of Boerne v. Flores, 521 U.S. 507, 534 (1997)).

99 *Id.* at 47.

100 *Cf.* Trustees of Dartmouth College v. Woodward, 17 U.S. (4. Wheat) 518, 662-63 (1819) (opinion of Washington, J.)

101 Plaintiff's Brief, *supra* note 5, at 49.

102 *See* United States v. Comstock, 130 S. Ct., 1949, 1967 (2010) (Kennedy, J., concurring in the judgment).

103 U.S. Const. art. I, § 8, cl. 1.

104 Government's Brief, *supra* note 29, at 50.

105 *See id*.

106 Florida *ex rel.* Attorney Gen. v. U.S. Dep't of Health & Human Servs., Nos. 11-11021 & 11-11067, slip op. at 175 (11th Cir. Aug. 12, 2011).

107 *Id.* at 176.

108 *Id.* at 176-77.

109 *Id.* at 181.

110 H.R. 3200, 111th Cong. (2009).

111 S. 1796, 111th Cong. § 1301 (2009).

112 Government's Brief, *supra* note 29, at 54.

113 *Id.*

114 Florida *ex rel.* Attorney Gen. v. U.S. Dep't of Health & Human Servs., Nos. 11-11021 & 11-11067, slip op. at 184 (11th Cir. Aug. 12, 2011), *quoting* Dep't. of Rev. of Mont. v. Kurth Ranch, 511 U.S. 767, 778 (1994).

115 *See* 26 U.S.C. § 5000A(b)(1).

116 *Florida ex rel. Attorney Gen.*, Nos. 11-11021 & 11-11067 at 186.

117 *See* 26 U.S.C. § 7806(b).

118 *See Florida ex rel. Attorney Gen.*, Nos. 11-11021 & 11-11067 at 187. Indeed, Congress placed numerous civil penalties within the Internal Revenue Code. These civil penalties run the gamut from broadly-applicable penalties, such as filing frivolous tax returns, to highly industry-specific penalties, such as selling or reselling adulterated diesel fuel that violates environmental standards. *See id.*

119 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161 (2010).

120 *See* Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987).

121 Plaintiff's Brief, *supra* note 5, at 60 (quoting R.R. Ret. Bd. v. Alton R. Co., 295 U.S. 330, 362 (1935)).

122 Government's Brief, *supra* note 29, at 55.

123 *Id.* at 59.

124 *Id.*

125 *Id.* at 56-57.

126 Plaintiff's Brief, *supra* note 5, at 61 (quoting Williams v. Standard Oil Co. of La., 278 U.S. 235, 242 (1929)).

127 Ayott v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329-30 (2006).

128 Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987).

129 Florida *ex rel.* Attorney Gen. v. U.S. Dep't of Health & Human Servs., Nos. 11-11021 & 11-11067, slip op. at 192 (11th Cir. Aug. 12, 2011).

130 *Id.*

131 *Id.* 192-93.

132 *Id.* at 193 (citing Office of Legislative Counsel, U.S. Senate, Legislative Drafting Manual § 131 (1997); Office of Legislative Counsel, U.S. House of Representatives, House Legislative Counsel's Manual on Drafting Style § 328 (1995)).